Supreme Court, U.S.
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No. 94-56

IN THE
Supreme Court of the United States
OCTOBER 1994 TERM

RICHARD MITCHELL and LARRY COTTEN,

Petitioners,

v.

STATE FARM FIRE and CASUALTY COMPANY,

Respondent.

OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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28 pp

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Tenth Circuit correctly held that the jury's award of $256,000 in actual damages on plaintiffs' bad faith breach of contract claim was irreconcilably inconsistent with its determination that State Farm did not breach the insurance contract, since, under the instructions given to the jury, and the evidence introduced at trial, the jury could not have awarded $256,000 pursuant to plaintiffs' bad faith claim.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of this cross-petition. Pursuant to Sup. Ct. R. 29.1, cross-petitioner represents that State Farm Mutual Automobile Insurance Company is the parent company of State Farm Fire & Casualty Company.

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Appendix A

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STATEMENT OF THE CASE

On September 6, 1976, State Farm issued an insurance policy for fire and extended coverage to Harry H. Hoesli, Jr. and Sarah P. Hoesli of Crested Butte, Colorado as insureds. The policy insured a building located on Castle Road in the town of Mount Crested Butte, Colorado.

On December 2, 1977 the State Farm fire insurance policy insuring this building was assigned to one Michael Pokress.

The building was subsequently purchased by Larry Cotten and Richard Mitchell for $255,000. State Farm consented to the assignment of this policy to Mitchell and Cotten. In connection with the purchase of the property, plaintiffs executed a promissory note to the Pokresses for $130,000. That note was subsequently extended several times.

At the time Mitchell and Cotten requested the assignment of the policy, the policy limit of coverage was $278,300. The policy coverage was increased to $300,000 on January 18, 1983, at the request of Mitchell and Cotten. Mitchell and Cotten requested that State Farm increase the policy limits because their bank, First National Bank of Fort Smith, Arkansas ("the Bank"), required them to do so as they were increasing their mortgage by taking advances on a construction loan on the property. The loan was secured by a second mortgage on the property in the amount of $385,000. The deed of trust on the property which secured the loan to the Bank also required that the insurance be increased to protect the loan.

The policy limits were subsequently increased on two occasions at the request of Mitchell and Cotten. Again, plaintiffs requested State Farm to increase the policy limits because of demands made on them by the Bank as the result of additional funds advanced on the construction loan.

By the time of the arson fire, plaintiffs had taken advances of virtually the entire amount loaned by the Bank and had spent it, but had not done any construction on the property. At the time of the fire, plaintiffs owed approximately $500,000 in loans secured by the property.

On May 27, 1985, the property was totally destroyed by fire. It is undisputed the fire was caused by arson. During the investigation of the claim, State Farm paid the holder of the first mortgage $113,164 in full payment of the note and took an assignment of the note and deed of trust as provided for in the insurance policy. State Farm also paid the insureds for debris removal and demolition under the policy. After the parties failed to reach an agreement as to the amount to which plaintiffs were entitled under the policy and after State Farm invoked the appraisal process, plaintiffs initiated this action in the Western District of Arkansas, Fort Smith Division C, demanding policy limits under the Arkansas valued policy statute. The case was subsequently transferred to the United State District Court for the District of Colorado pursuant to 28 U.S.C. § 1404(a).

Cross-motions for partial summary judgment were filed by both parties regarding whether Arkansas or Colorado law applied with respect to the amount plaintiffs were entitled to recover under the policy. State Farm's position was that Colorado law applied with respect to the amount of recovery available under the insurance policy, and that plaintiffs were limited to recovering the actual cash value of the property.

Plaintiffs' position was that Arkansas law applied with respect to the amount of recovery available and that Arkansas' "valued policy" statute permitted them to recover the policy limits. Ark. Stat. Ann. § 66-3901, now Ark. Stat. Ann. § 23-88-101 (1987).

The district court ruled that Arkansas law applied and that, therefore, plaintiffs were entitled to recover $450,000 rather than the actual cash value of the property. The district court granted the parties' stipulated motion for certification for appeal of interlocutory order pursuant to 28 U.S.C. § 1292(b). The Tenth Circuit Court of Appeals granted State Farm's petition for permission to appeal on June 26, 1989.

The Tenth Circuit reversed the district court's order in *Mitchell v. State Farm Fire & Cas. Co.,* 902 F.2d 790 (10th Cir. 1990) ("*Mitchell I*") and held that Colorado law applied.

After the Tenth Circuit reversed the district court's decision, and pursuant to the appraisal provision of the insurance policy, the issue as to the additional amount, if any, to which the Bank, as holder of the second mortgage was entitled, was submitted to arbitration. The amount of the second mortgage exceeded the policy limits and therefore no amounts would have been payable to the insureds. The arbitrators made an award based on the actual cash value of the property less amounts paid by State Farm to the holder of the first mortgage, and for debris removal and clean-up, and awarded the Bank $73,268, rather than the policy limits of $450,000 which plaintiffs had demanded. State Farm satisfied the award to the Bank and nothing remained owing to plaintiffs.

Plaintiffs' claims against State Farm for breach of contract and bad faith breach of insurance contract proceeded to trial. The jury rendered a verdict in State Farm's favor on plaintiffs' breach of insurance contract claim. However, the jury rendered a verdict in plaintiffs' favor on their bad faith breach of insurance contract claim. The jury assessed compensatory damages in the amount of $256,000, the difference between the amount that was paid by State Farm pursuant to the policy, and the policy limits of $450,000.

State Farm then appealed to the Tenth Circuit on several bases, including the contention that the jury's verdict findings that State Farm did not breach the insurance contract, yet breached the insurance contract in bad faith, were irreconcilably inconsistent. The Tenth Circuit reversed the district court's entry of judgment in plaintiffs' favor. *Mitchell v. State Farm Fire & Cas. Co.,* 15 F.3d 959 (10th Cir. 1994) (*Mitchell II*). The Court disagreed with State Farm's argument that the jury verdict findings that State Farm did not breach the contract, yet was in bad faith, were not irreconcilably inconsistent. 15 F.3d at 962. However, the Court perceived a different inconsistency in the jury's verdicts.

The Court held that the jury finding for State Farm on plaintiffs' claim for breach of contract, and then awarding plaintiffs $256,000 on their bad faith claim was inconsistent because no evidence was introduced that plaintiffs sustained $256,000 in damages as the result of any delay in payment of their claim. The Court therefore vacated the judgment entered in plaintiffs' favor and reversed with instructions to retry the bad faith claim.

Plaintiffs then filed a petition for rehearing and suggestion for rehearing en banc. Plaintiffs argued that the jury's verdicts were not irreconcilably inconsistent because the jury could have awarded them $256,000 in damages based on their "overinsurance" theory of bad faith liability, rather than their "delay" theory of liability.

The Tenth Circuit denied plaintiffs' petition for rehearing and suggestion for rehearing en banc. *Mitchell v. State Farm Fire & Cas. Co.,* 20 F.3d 395 (10th Cir. 1994). The Court reasoned that, although plaintiffs alluded to an "overinsurance" theory of liability at trial, the jury was only instructed that plaintiffs could recover on their claim of breach of duty of good faith and fair dealing if it found that State Farm unreasonably delayed payment of plaintiffs' claim. Because this bad faith instruction directed plaintiff to a specific theory of liability upon which plaintiffs did not introduce evidence indicating $256,000 in damages, the Court confirmed its initial holding that the jury verdicts were irreconcilably inconsistent.

Plaintiffs' petition for certiorari follows.

SUMMARY OF ARGUMENT

Because the jury was instructed that it could find State Farm liable for breach of the duty of good faith and fair dealing only with respect to plaintiffs' "delay" theory of liability, the Tenth Circuit correctly concluded that the jury's verdicts could not be "fairly harmonized" and, therefore, were irreconcilably inconsistent.

Further, plaintiffs' "overinsurance" theory of liability was meritless under the circumstances presented in this case since plaintiffs themselves, not State Farm, overinsured the property by failing to use their construction loans to improve the property.

Since plaintiffs did not raise their argument that State Farm waived its "inconsistent verdicts" issue until plaintiffs' petition for rehearing, plaintiffs are precluded from raising this issue in their petition for certiorari.

Assuming the Tenth Circuit correctly reversed and remanded with instructions to retry the bad faith claim, a retrial on both liability and damages is mandated.

REASONS FOR NOT GRANTING THE PETITION

A. The Tenth Circuit Correctly Concluded that the Jury Verdicts Were Irreconcilably Inconsistent

Plaintiffs correctly contend that an appellate court must attempt to reconcile jury verdicts, and where there is a view of the case that make the jury's answers to special interrogatories consistent, they must be resolved that way. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed.2d 798 (1962); *also see Gallick v. Baltimore & Ohio Railroad Co.,* 372 U.S. 108, 83 S. Ct. 659, 9 L.Ed.2d 618 (1963). However, a reviewing court will find jury verdicts inconsistent when it cannot "fairly harmonize them." *Delano v. Kitch,* 663 F.2d 990, 999 (10th Cir. 1981).

Plaintiffs contend that the jury verdict holding State Farm liable for bad faith and awarding them $256,000 in damages, while also finding that State Farm did not breach the insurance contract, can be reconciled because the jury could have awarded these damages pursuant to its "overinsurance" theory of bad faith, rather than their "delay" theory of bad faith. Assuming that plaintiffs' "overinsurance" theory of bad faith had merit (which, as discussed elsewhere, it did not), plaintiffs' argument is incorrect because it ignores the fundamental tenet of appellate

review that required the Tenth Circuit, and requires this Court, to assume that the jury followed its instructions in this case.

The theory under which jury instructions are given by the trial courts and reviewed on appeal is that juries act in accordance with the instructions given them. *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S. Ct. 1571, 89 L.Ed.2d 806 (1986). A reviewing court must assume that the jurors followed the law as given by the court, *Lloyd v. Grynberg,* 464 F.2d 622 (10th Cir. 1972), and also assume that the jurors attend closely the particular language of the trial court's instructions and follow those instructions. *Williams v. United States Elevator Corp.,* 920 F.2d 1019 (D.C. Cir. 1990).

The jury was instructed as follows with respect to plaintiffs' claim for breach of duty of good faith and fair dealing:

> In order for the plaintiffs to recover from the defendant on their claim of breach of duty of good faith and fair dealing, you must find all of the following have been proved:
>
> 1. The plaintiffs incurred damages;
>
> 2. *The defendant acted unreasonably in delaying payment on plaintiffs' claim without a legitimate basis for said delay;*
>
> 3. The defendant knew its conduct was unreasonable or the defendant recklessly disregarded the fact that its conduct was unreasonable; and
>
> 4. The defendant's unreasonable conduct was a cause of the plaintiffs' damages.
>
> If you find that any one or more of these four propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.
>
> On the other hand, if you find that all of these four propositions have been proved by a preponderance of

> the evidence, then your verdict must be for the plaintiffs. (Emphasis added)

Since the jury found for plaintiffs on their claim of breach of the duty of good faith and fair dealing, it must be presumed it followed this instruction in reaching this conclusion. *City of Los Angeles v. Heller, supra.* The jury was not instructed that it could find for plaintiffs if it determined that defendant acted unreasonably in delaying payment on plaintiffs' claim *or* that it acted unreasonably in "overinsuring" the property. It is irrelevant that plaintiffs argued to the jury their "overinsurance" theory of bad faith; the specific instructions precluded the jury from predicating liability on that theory. Because the foregoing instruction was not general in nature and restricted liability to one of the theories of bad faith presented by plaintiffs, the jury could not, under its instructions, predicate liability on any theory other than plaintiffs' "delay" theory.

Contrasting the jury instructions in this case with the jury instructions in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, supra* illustrates the fallacy of plaintiffs' argument. There, the plaintiff predicated negligence on several theories of liability after being injured while helping to discharge bales of burlap from a vessel. The jury instruction concerning liability instructed the jury to determine "whether or not there was a reasonably safe discharge" of the cargo. This Court held that the jury instruction was general in nature and permitted the jury to consider the totality of the circumstances in determining the defendant's liability. Therefore, this Court held that the jury verdicts could be reconciled.

In contrast, here, the jury was not permitted to consider the "totality of circumstances" in determining whether State Farm was liable for breach of the duty of good faith and fair dealing. Rather, it was specifically instructed that it could find liability on this theory if State Farm acted unreasonably in delaying payment on plaintiffs' claim. The only logical inference the jury could draw from this instruction is that it could not predicate liability on any other of plaintiffs' theories.

Since, as the Tenth Circuit held, and plaintiffs do not contest, the jury could not have awarded $256,000 in damages based on any delay in paying their claim, the jury's verdict finding that State Farm acted in bad faith in allegedly delaying payment of their claim, yet awarding them $256,000 in damages, cannot be "fairly harmonized." Consequently, the Tenth Circuit correctly held that the jury's verdicts were irreconcilably inconsistent. *See Delano v. Kitch, supra.*

B. Plaintiff's "Overinsurance" Theory of Bad Faith Liability was Meritless as a Matter of Law Under the Circumstances Presented in This Case

Additionally, plaintiffs' "overinsurance" theory of liability was utterly meritless and should not have been submitted to the jury in the first instance. Therefore, if the jury had awarded $256,000 in damages to plaintiffs based on their "overinsurance" theory, State Farm should have been entitled to judgment notwithstanding the verdict in any event.

Plaintiffs argued at trial that State Farm was acting in bad faith by permitting them to raise the policy limits on the property to $450,000 when the replacement cost or actual cash value of the property was less than that amount. Plaintiffs' expert, Garth Allen, testified that "overinsuring" was one aspect of his opinion that State Farm was in bad faith.

The first glaring logical problem with plaintiffs' overinsurance theory is that the property was already "overinsured" when plaintiffs bought it. The policy limits were $278,300 at the time plaintiffs requested assignment of the policy from the Pokresses. Therefore, according to plaintiffs' reasoning, State Farm acted in bad faith before there was even an insurer-insured relationship between the parties.

The policy limits were then raised at the request of Mitchell and Cotten based upon their representations to State Farm that the Bank told them they were underinsured.[1] The reason that the Bank was requiring plaintiffs to increase their policy limits was not because the value of the property was increasing, but because plaintiffs' *debt* was increasing. The reason that plaintiffs *debt* was increasing was that they were taking out construction loans for "funds to be advanced for construction of condominium at Mount Crested Butte, Colo."

Plaintiffs were not raising the limits of their policy based upon any assumption that the value of the property was increasing. They were raising the limits of their policy because their own bank required them to based upon their representation that the loan money was being utilized to improve the property. Presumably, if plaintiffs had used the construction loan money for its stated purpose of improving the condominium properties, the value of the property would have increased. In fact, Mr. Cotten testified that if the $385,000 plaintiffs took out in loans from the Bank had been used to improve the property, it would have been worth $755,000. (Resp. App., p.1) The promissory note executed by plaintiffs for the $385,000 loan from the Bank indicated the appraised completed value of the property would be $755,000. The appraisal report from Crested Butte Realty Company to the Bank appraised the property at $755,000 upon completion of the construction improvements. However, plaintiffs did not use the construction loan money to improve the property.

Mr. Cotten testified that when the fire occurred, plaintiffs had spent all of the loan money without improving the property. (Resp. App., p.2) Mr. Cotten also testified that if State Farm hadn't agreed to increase the insurance coverage, plaintiffs would have gone to another insurance company instead. (Resp. App., pp. 3-4) The fact that State Farm may have known the

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[1] Thus, indulging for a moment in the false assumption that plaintiffs' "overinsuring" theory had any merit, they sued the wrong party. If anyone owed them a duty under these circumstances, it would have been the Bank, not State Farm.

property was not worth $450,000 at the time plaintiffs executed these loans has no legal or logical relevance. Plaintiffs undisputedly knew this fact as well.

Plaintiffs borrowed $385,000 and represented to the Bank and State Farm that this money would be used to remodel the property State Farm insured for them. Because the Bank demanded that plaintiffs increase their policy limits and, based on their estimation of what the property would be worth after putting $385,000 into construction, State Farm complied with plaintiffs' request to increase the policy limits. Several years later, when the property burned and plaintiffs had not put one dime of that loan money into the property, the property was naturally worth much less than the policy limits. Plaintiffs then sued State Farm for bad faith and requested as "damages" that State Farm assume their debt to the Bank, or pay the difference between the policy limits and what State Farm actually owed under the policy. This theory of bad faith liability is incomprehensible under the facts of this case. The fact that Garth Allen predicated, in part, his conclusion that State Farm's conduct was in "bad faith" for "overinsuring" the property is immaterial. Testimony devoid of common sense is not transformed into legitimate evidence simply because its proponent is deemed an "expert." *See Viterbo v. Dow Chemical Co.,* 826 F.2d 420, 421 (5th Cir. 1987).

Plaintiffs' implication that State Farm's expert, Kent Miller, agreed with Mr. Allen's opinion is deliberately misleading. The excerpt of Mr. Miller's testimony contained in plaintiffs' petition for certiorari was directed to a theory of "overinsurance" in a vacuum, without reference to the circumstances of this case. What plaintiffs neglected to include in their appendix was Mr. Miller's testimony regarding plaintiffs' "overinsurance" theory with reference to the facts of *this* case:

> Q Mr. Miller, if the insured requests that the company increase the insurance coverage and the basis for the request is the bank is requiring that the amount of the insurance on that property be

increased to the amount of the loan, in your opinion, does the company act properly in increasing the coverage under those circumstances?

A Now I think — you're talking about *this* case?

Q Yes, sir.

A Yes. And the additional consideration is that the bank loans for construction or improvement of the property if the request to the insurance company is — the insured says, I want to increase the coverage on the property. I want to do that because the bank has requested it and the request is pursuant to a construction loan that we are taking out to improve the property, the expectation by the insurance company is that the property will increase substantially in value, something consistent with the money being put into the property. (Emphasis added)

(Resp. App., pp. 5-6)

Since plaintiffs' "overinsurance" theory of liability had no legal or logical basis under the facts of this case, the jury's verdict could not stand, even if it had been permitted, pursuant to the jury instructions, to award damages to plaintiffs under this theory of bad faith. Consequently, certiorari review is unnecessary for this reason as well.

C. Plaintiffs Waived Their Argument That State Farm Waived its Inconsistent Verdicts Argument Since Plaintiffs did not Advance This Argument Until Their Petition for Rehearing

An argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing. *Costo v. United States,* 922 F.2d 302 (6th Cir. 1990); *United States v. Lewis,* 798 F.2d 1250 (9th Cir. 1986). Nor may a party shift its position on an issue in a petition for rehearing. *United States v. Smith,* 781 F.2d 184 (10th Cir. 1986).

Plaintiffs' argument in their answer brief and at oral argument with respect to the inconsistent verdicts issue was directed only at the merits of State Farm's position that the verdicts were inconsistent. Plaintiffs did not argue that State Farm waived its right to raise the issue by not objecting at trial. For this reason alone, plaintiffs' contention that State Farm waived the right to raise the inconsistent verdicts issue in its post-trial motions and on appeal must be rejected. *Costo v. United States, supra.*

While, under special circumstances, appellate courts have the discretion to address arguments raised for the first time in a petition for rehearing, *see Boardman v. Estelle,* 957 F.2d 1523 (9th Cir. 1992), it is within its discretion *not* to do so as well. *Boardman v. Estelle, supra.* Plaintiffs offered the Tenth Circuit no reason why it should address the "waiver" issue raised for the first time in its petition for rehearing, and, consequently, the Tenth Circuit clearly did not abuse its discretion in ignoring plaintiffs' argument. The only reason plaintiffs offer this Court as justification for raising this issue for the first time in their petition for rehearing is that they "did not deem the argument significant enough to devote appellate brief space to it . . ." in their answer brief in the Tenth Circuit. (Plaintiffs' petition for rehearing, p.22,n.6) This statement rivals plaintiffs' "overinsurance" theory of bad faith liability for pure gall. If plaintiffs did not perceive the argument significant enough to waste the Tenth Circuit's time, they certainly should not be wasting this Court's time with it.

Moreover, a party's failure to object to a verdict on the ground of inconsistency prior to the jury's discharge waives his right to raise the issue in a post-trial motion or on appeal *unless the verdict is inconsistent on its face so that entry of judgment on the verdict is plain error. Hinds v. General Motors Corp.,* 988 F.2d 1039, 1047 (10th Cir. 1993); *Diamond Shamrock Corp. v. Zinke & Trumbo Ltd.,* 791 F.2d 1416, 1424 (10th Cir. 1986). As the Tenth Circuit held, the jury verdicts were inconsistent on their face since the jury found that State Farm did not breach the contract, that State Farm did breach the duty of good faith and fair dealing, yet it awarded plaintiffs $256,000 in damages, which amount

could only have been awarded, if at all, pursuant to the breach of contract, and not the bad faith, claim. Consequently, the inconsistency does constitute plain error. *See Hinds v. General Motors Corp., supra.*

D. Assuming the Necessity of Further Proceedings, a Retrial of both Liability and Damages is Mandated

As articulated in State Farm's cross-petition for certiorari, filed contemporaneously with this brief in opposition, further proceedings are unnecessary since State Farm is entitled to judgment as a matter of law because plaintiffs did not prove any damages resulting from State Farm's conduct. However, assuming, *arguendo,* that further proceedings are necessary, the Court of Appeals order remanding for a determination of both liability and damages pursuant to plaintiffs' bad faith claim is appropriate. Where a jury's liability verdict is inconsistent with its damages verdict, a retrial on *both* liability and damages is necessitated. *Fugitt v. Jones,* 549 F.2d 1001, 1005 (5th Cir. 1977). Since such inconsistent verdicts demonstrate confusion on the part of the jury, retrial of both liability and damages is obviously necessary to resolve the inconsistency.

CONCLUSION

Since the Tenth Circuit correctly concluded that the jury's verdicts were irreconcilably inconsistent, and since plaintiffs' "overinsurance" theory of liability was baseless as a matter of law, plaintiffs' contention that their Seventh Amendment rights have been violated is without merit. There exists no reason for this Court to grant certiorari. Sup. Ct. R. 10.1.

Dated this 11th day of August, 1994.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of August, 1994 a true and correct copy of the foregoing **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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APPENDIX A

Excerpts of Trial Transcript 1a

APPENDIX

Q He gave you a letter to give to the bank that if you completed this construction, this property would be worth $755,000, right?

A Yes, sir.

Q And that was the market value that you used for purposes of obtaining this loan from the First National Bank, right?

A Yes, sir, it was. And there are variances in the values of the units because the upstairs units — the downstairs units were just — were two-bedroom with no loft. The upstairs units had humongous lofts up there. Gosh, you sleep 12, 16 people up in those lofts, so they had a higher value. Plus they had maybe a little better view, too, from up higher.

Q If you, in fact, had used the $385,000 for improvements on this property, would it have been worth $755,000 or close to that, in your opinion?

A Oh, I think it was close to that, in my opinion, without any remodel.

Q It would have been, certainly, after remodeling was completed, then; is that right?

A I certainly believe it would have perhaps been worth more than that. You know, it was a better location than where I had just purchased for $160,000.

Q Now, Mr. Mitchell handled all of the disbursements or advances on the loan; is that right?

A To the vast majority, yes, sir, he did. Again, I go back,

Q In fact, I thought I heard you testify that the bank would apply the interest to the loan itself rather than you paying it which would increase the loan.

A Sir, I believe I testified that we would take money — there were times that we did it in different ways; that sometimes the bank, yes, would — we would make a drawdown and pay some interest. There were some times when we would take a

partial draw and take money out of our pocket and pay the interest due that way. And then there were some times that we just took the money out of our pocket and made the interest payments, I believe was my testimony. If it wasn't, that's sure what it needs to be.

Q And as I understand it, by the time this fire occurred, you and Mr. Mitchell had spent all of the loan proceeds from that loan from First National Bank; is that correct?

A In looking at the note, yes, sir, it is correct.

Q You and Mr. Mitchell provided the bank with an appraisal letter from Mr. Jacobsen up in Crested Butte as to the value of this property before you obtained the loan from the bank; isn't that correct?

A No, sir, that's not correct. It was not an appraisal letter. That's been mischaracterized. It was just an estimate of value that if we added the fifth unit to them and did the work that we intended to do — Mr. Jacobsen is a realtor in the Mount Crested Butte area, and this is what these units — we

Q company rebuild that was a building that you and Mr. Mitchell owned?

A As I previously testified to, this was a company that I owned 50 percent of. You know, had this company gone up and rebuilt this building, then that would have been a contract that we could have not taken somewhere else that would have tied that company up, plus I had a partner in that company that I didn't feel it was prudent to tell him he had to do something at cost with no profit being involved in it.

Q Mr. Cotten, you testified earlier that these insurance increases were necessitated because the bank required them in connection with the loan that you had on the Mount Crested Butte property, right?

A Yes. I testified to that as well as we felt it an obligation that we had to all our lenders, you know, both the bank, the

Pokresses, you know, all the lenders involved in this thing. We had an obligation to them to keep the building covered.

Q And if, in fact, State Farm would not have increased the insurance coverage up to the amount of the loan that the bank had, you would have had to have gone to some other insurance company to obtain that insurance, right?

A That would have certainly given us the opportunity to go shopping around. Had State Farm ever told us that they did not want to increase the premium; if they ever told us that — as I understood in this court, that they had a replacement estimate of 155,000; had they ever told this to us —

Q Mr. Cotten, that's not responsive. Could you answer my question. Would you have gone to that source to obtain that insurance if State Farm would not have increased the coverage that the bank was requiring? That's my question.

A That's what I was trying to answer. Yes, sir, it would have given us that opportunity.

Q That's what you would have done?

A Yes, sir.

Q All right. You testified earlier today — I'll refer you to Exhibit — Defendant's — I'm sorry — Plaintiff's Exhibit 44. Would you refer to that, please. That's a letter from your attorney to State Farm, is it not — or to State Farm's attorney, Mary Wells?

A Well, this is a letter to Mr. Ehrsam, I believe.

Q You're right, it's a letter to Mr. Ehrsam from your attorney, Mr. Taylor. Is that right?

A Yes, sir, it is.

Q And would you refer to Plaintiff's Exhibit 47 and identify that, please.

A Yes. This is a letter from Philip Taylor to Stephen J. — I believe it's Baity. Is that the correct pronunciation?

Q Yes. And State Farm, in fact, responded to both of those letters, did they not, Mr. Cotten?

won't take your premium because we'll never pay that much. You are wasting your money to pay that kind of premium. And more important, we don't want you to think that if there's a fire, we're going to pay anything like that? An insurance company has a duty to tell their insureds that; isn't that true?

A Yes, if they know there's an attempt to overinsure the property.

MR. CORTEZ: I have no further questions. Thank you.

THE COURT: Anything else of this witness?

MR. HUNSAKER: Just one short question, Your Honor.

REDIRECT EXAMINATION

BY MR. HUNSAKER:

Q Mr. Miller, if the insured requests that the company increase the insurance coverage and the basis for the request is the bank is requiring that the amount of the insurance on that property be increased to the amount of the loan, in your opinion, does the company act properly in increasing the coverage under those circumstances?

A Now I think — you're talking about this case?

Q Yes, sir.

A Yes. And the additional consideration is that the bank loan is for construction or improvement of the property. If the request to the insurance company is — the insured says, I want to increase the coverage on the property. I want to do that because the bank has requested it and the request is pursuant to a construction loan that we are taking out to improve the property, the expectation by the insurance company is that the property will increase substantially in value,

something consistent with the money being put into the property.

So the insurance company, I think, acts reasonably — the insurance company can't say, We have to see the blueprints. We want an appraisal. How do we know it will be worth that much? I think the insurance company acts on the good faith understanding that the insured has made that the value of the property is going to go up, there's a big loan on the property, the bank requires its collateral be insured in this amount. And the insurance company will in all instances, I think, respond to that by saying, All right, we will raise the coverage.

Q And do you have an opinion as to whether the insurance company has any obligation to check to see if the proceeds of the construction loan are, in fact, being used for improvements on the property?

A I don't know of any insurance company that undertakes that kind of responsibility. They rely upon banks not to disburse construction loans until and unless the property is being improved. And banks have departments and people set up to handle disbursements of construction loans pro rata to the progress being made on the property. So the insurance company